STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY MATTHEWS,

Defendant-Appellant.

UNPUBLISHED
June 25, 2002

No. 228538
Wayne Circuit Court
LC No. 98-012138

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of armed robbery, MCL 750.529, and sentenced to concurrent terms of 100 to 240 months. Defendant appeals as of right, and we affirm.

Defendant first argues that his statement to the police was not voluntary. Following an evidentiary hearing, the trial court determined that the statement was voluntary. A trial court must view the totality of the circumstances in deciding whether a defendant's statement was knowing, intelligent and voluntary. *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000). This Court will not reverse the trial court's factual findings unless they are clearly erroneous. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). Questions of law are reviewed de novo. *Manning*, *supra.* Among the many factors to be considered in determining whether a statement is voluntary are the defendant's age, his lack of education or intelligence level, his previous experience with the police, the length of detention, the lack of advice regarding his rights, any unnecessary delay, the presence of injury, alcohol or drugs, the defendant's health, whether the defendant was deprived of food, sleep or medical attention, whether the defendant was physically abused, and whether he was threatened with abuse. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). The goal is to determine whether the defendant's "will has been overborne and his capacity for self-determination critically impaired," and whether the statement is "the product of an essentially free and unconstrained choice by the maker." *Id.* (citations omitted).

Here, defendant was nineteen years old, with an eleventh grade education, and had little previous contact with the police. He cites the delay between his arrest and his final statement, a "filthy" holding cell where he was unable to sleep because it contained a rat, and the lack of family contact due to the police restricting his phone access, as factors rendering his statement involuntary. However, the record reflects that defendant was always permitted to use the

telephone to call an attorney, that he understood and initialed his rights, that he reviewed his statement and that he thought he would be able to go home "because I was only supposed to been a lookout." Defendant does not claim that he was ill or under the influence of drugs or alcohol. Defendant admitted that he understood his rights. As the trial court noted, it gauged the credibility of defendant and the officers in making its determination of voluntariness. The court found that defendant was not promised anything and was not abused or threatened, that he understood his rights and voluntarily waived them, and that his claim regarding the rat was questionable. The court concluded that under the totality of the circumstances, defendant's statement was voluntary. We find no error.

Defendant also argues that the trial court erred in denying his motion to suppress evidence obtained in a search of his residence. Defendant argues on appeal that his aunt did not have the authority to consent to a search of his house and that, in any event, she did not give free and informed consent. We review the trial court's decision regarding the validity of consent for clear error. *People v Goforth*, 222 Mich App 306, 310; 564 NW2d 526 (1997). Whether consent is freely and voluntarily given is a question of fact "based on an assessment of the totality of the circumstances." *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999). We also review the trial court's decision regarding suppression of evidence de novo. *Goforth, supra.*

Police officers testified that defendant's aunt gave them permission to enter the residence and signed a consent to search form. One officer said that defendant's aunt even offered to show the police around. Defendant's aunt testified that she did not give the police permission to enter the house and that she could not give permission because it was not her house. The house belonged to defendant's parents, who were not home, but defendant's aunt lived in the basement. Defendant's aunt claimed that the police "snatched" the door off its hinges and forced their way in. She testified that the officers threatened her and the children in the house and told her to sign the paper to prevent them from taking one of the children to juvenile hall. Defendant's aunt testified that she cannot read but that she can sign her name.

Consent may be given by a third-party who has common authority over the premises. *Goforth, supra*. Here, where defendant's aunt lived in the basement of the house, answered the door and was the only adult on the premises, we find no clear error in the trial court's conclusion that she had the authority to consent to the search. Although defendant's aunt testified that she lacked authority, that she was threatened, and that she did not freely give consent, the police officers testified that she let them into the house and told them they could search it. The trial court, having heard the testimony, concluded that defendant's aunt was not credible. We defer to the trial court's resolution of a factual issue when it involves the credibility of witnesses whose testimony is in conflict. *People v Parker*, 230 Mich App 337, 341; 584 NW2d 336 (1998). We find no error.

Finally, defendant argues that he was denied a fair trial because the prosecutor elicited testimony that the police followed the sound of gunshots when they arrived on the scene. We review allegations of prosecutorial misconduct in context to determine whether the defendant was denied a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). We find no reversible error.

An officer testified that he heard someone "jumping a fence" and then heard six gunshots. The police followed the sound to a vacant house. They were then approached by

someone who gave them information. They then went to the house where defendant was arrested and evidence of the crime was found. We agree that the testimony concerning the gunshots was unnecessary. However, no evidence was admitted to link defendant to the gunshots, and the prosecutor did not attempt to introduce the evidence to establish guilt, but rather, to explain how the police ended up at the house. Further, as the trial court noted, any prejudice caused by the testimony was "cleared . . up" by defense counsel's cross-examination of the witness, and the trial court also offered a curative instruction. Defendant was not denied a fair and impartial trial on this basis. *Reid, supra.*

Defendant further contends that the trial court abused its discretion in denying his motion for a mistrial based on the evidence that a police officer pursued the sound of gunshots. This Court will find an abuse of discretion only where the trial court's denial of the motion deprived defendant of a fair and impartial trial. *People v Wolverton,* 227 Mich App 72, 75; 574 NW2d 703 (1997). Defendant asserts that the prosecutor promised not to introduce evidence that gunshots were fired without giving defendant an opportunity to challenge admission of the testimony. The record establishes that the prosecutor told the court that he intended to introduce the evidence that shots were fired but would not introduce evidence that they were fired at the police officers, and that he would not mention the evidence in opening. The prosecutor should have alerted the court when he reached the point that he intended to ask about the gun shots. On the other hand, defendant should have objected immediately when the testimony was elicited. In all events, because the evidence did not deprive defendant of a fair and impartial trial, the court did not abuse its discretion in denying defendant's request for a mistrial. *Id.*

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Helene N. White